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In the Supreme Court of the United States

OCTOBER TERM, 1992

LEONARD L. GUMPORT, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,
CROSS-PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether cross-petitioner, a trustee in bankruptcy for a motor carrier, has standing to challenge the validity of the carrier's tariff rates.

2. Whether the Interstate Commerce Commission reasonably determined to permit motor carriers to file discount tariffs with shipper-account codes, rather than the names of particular shippers.

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BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App.[1] 1a-27a, is reported at 981 F.2d 402. The amendment to the opinion filed on April 5, 1992, and the opinion concurring in the denial of rehearing, Cross-Pet. App. 4a-8a, are not yet reported. The opinion of the district court, Pet. App. 31a-59a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1992. Petitions for rehearing were denied on November 25 and April 5, 1992. Pet. App.

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[1] "Pet. App." refers to the appendix to the petition in No. 92-1547.

60a; Cross-Pet. App. 5a. On February 16, 1993, Justice O'Connor extended the time for the Interstate Commerce Commission (ICC or Commission) to file a petition for a writ of certiorari to and including March 25, 1993, and the petition was filed on March 23, 1993. The cross-petition for a writ of certiorari was filed on April 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Cross-petitioner is the trustee for a bankrupt motor common carrier, Transcon Lines. It seeks review of the court of appeals' holding that the motor carrier and its trustee lack standing to attack the adequacy of publication under the Interstate Commerce Act (Act) of the carrier's filed tariffs.[2]

1. Under the Act, motor common carriers must charge shipping rates that are published in tariffs filed with the ICC. 49 U.S.C. 10761, 10762(a)(1). With respect to the contents of the tariffs, the Act provides:

> A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. * * *

49 U.S.C. 10762(a)(1). The Commission is also to "prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section." 49 U.S.C. 10762(b)(1).

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[2] The ICC's petition for a writ of certiorari in No. 92-1547 contains a detailed statement of the facts in this case. This brief in opposition will address the additional facts that are pertinent to the cross-petition.

In 1984, the Commission ruled that a motor carrier's publication of rates for individual shippers does not constitute per se discrimination under the Act. *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984) (*Named Shipper*). Thereafter, the ICC received and granted numerous requests by carriers to identify rates applicable to particular shippers by account code, rather than by name.[3] In 1986, the Commission sua sponte issued blanket authorization for the trucking industry to publish rates by shipper code. *Outstanding Relief for "Shipper Account Codes"—Individual Motor Common Carriers and Freight Forwarders*, STA No. 86-639 (Apr. 29, 1986) (*Outstanding Relief*). The prevalence in the trucking industry of shipper-coded tariffs led to a formal challenge by certain carriers (not including Transcon) to the lawfulness of such tariffs. In *Petition for Declaratory Order—Discounts and Customer Account Codes*, 8 I.C.C.2d 47, 53 (1991) (*Customer Account Codes*), the Commission concluded that "[t]here is nothing in law or policy that establishes a wholesale prohibition from publication of tariffs that do not include direct shipper identifications." No party sought judicial review either of that decision or of any other Commission decisions approving the use of shipper-coded tariffs.

2. This case involves a civil action brought by the ICC to enjoin cross-petitioner from attempting to collect additional freight charges from shippers in violation of the ICC's credit regulations. The district

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[3] Transcon Lines requested and received permission in 1986 to publish rates by shipper code in order to "facilitate computerization * * *, thus enhancing accuracy, improving efficiency and reducing costs." *Customer Account Number*, Special Tariff Authority (STA) No. 86-470 (Feb. 5, 1986).

court granted summary judgment in favor of cross-petitioner on two alternative grounds. First, the court ruled that cross-petitioner was entitled to collect the additional charges set forth in Transcon's filed tariffs, without regard to whether the collection of those charges violated the ICC's credit regulations. Second, the district court accepted cross-petitioner's alternative argument that Transcon's discount tariffs were invalid because the tariffs identified the shippers to whom the rates applied by account-code number rather than by name. Pet. App. 45a-47a, 54a.

The district court did not determine what rates cross-petitioner could collect in light of its holding that the coded rates were invalid. Cross-petitioner, however, interpreted the judgment as stating that the only rates in effect were Transcon's bureau rates.[4] Cross-petitioner then sought to collect those higher, bureau rates from shippers who had previously received discounts under the coded tariffs. Pet. App. 21a.

3. The court of appeals affirmed the district court's judgment denying the ICC an injunction to enforce its credit regulations. Pet. App. 16a-21a, 27a. That holding is the subject of the ICC's petition for a writ of certiorari in No. 92-1547.

The court of appeals also reversed the portion of the district court's decision invalidating Transcon's shipper-coded discount tariffs. The court held that

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[4] As we explain in our petition in No. 92-1547, Pet. 3 & n.2, Transcon had several tariffs on file with the ICC setting forth tiers of rates. The highest rates were those contained in the collectively set bureau tariffs; lower rates were set forth in Transcon's discount tariffs, most of which were published using shipper-account codes. See Pet. App. 4a-5a.

cross-petitioner lacks standing to challenge the validity of Transcon's filed tariffs. Pet. App. 21a-27a; Cross-Pet. App. 4a-5a. The court found that, under the Act, neither a carrier nor its trustee can contest the lawfulness of the tariffs that the carrier filed with the Commission. Pet. App. 22a-23a.

First, the court stated that, while a carrier has standing to argue that the rate that it charged a shipper is not a filed rate, and therefore is not a "legal" rate under the Act, Pet. App. 22a, citing *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), "it is another matter for a carrier to challenge the lawfulness of its own filed rates" Pet. App. 22a. The court explained that a federal court "has no power to declare a filed rate unlawful and award damages to a carrier for the past application of the rate by the carrier." *Ibid.* Because the unavailability of such a remedy means that the court has no power to award cross-petitioner any "effective relief for the unlawfulness [it] allege[s]," the court of appeals concluded that cross-petitioner failed to satisfy the requirement under Article III of the Constitution that a litigant present a claim that is capable of being redressed by the relief requested. *Id.* at 23a. The court also rejected the suggestion that the trustee could "fit into the overshoes of the bankrupt's creditors" in order to "challenge rates Transcon has filed in an effort to collect higher rates." *Id.* at 23a-24a.

Second, the court of appeals concluded that cross-petitioner failed to satisfy the prudential standing requirement of asserting a claim that is within the zone of interests protected by the relevant provisions of the Act. Pet. App. 24a-25a. "The publication requirement of the statute is designed to protect ship-

pers against discrimination and to protect carriers against the competitive disadvantage they may suffer if other carriers discriminate. It is not designed to allow carriers, or their successors in bankruptcy, to repudiate their own filed rates in hopes of collecting a higher rate." *Id.* at 24a. The court of appeals stated that, "[t]o permit such a process would be to stand the [Act] on its head and give federal courts an authority over rates" that the courts lack. *Id.* at 25a, citing *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131, 140 (1982); Cross-Pet. App. 4a.[5]

In light of its holding on the coded-rates issue, the court of appeals remanded the case to the district court for entry of an injunction against cross-petitioner that would enjoin it from collecting any amounts from Transcon's former customers based upon the alleged "unlawfulness of coded rates or the unlawfulness of individual discount rates." Pet. App. 27a.

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[5] The quoted sentence, and the paragraph in which it appears, was included in the court of appeals' initial opinion. Pet. App. 25a. That paragraph was deleted by the court's December 10, 1992, amendment of its opinion, *id.* at 29a, but was restored by the court's April 5, 1993, amendment of its opinion. Cross-Pet. App. 4a-5a. On the same date, the panel denied the petition for rehearing and the full court rejected the suggestion for rehearing en banc. Judge Norris filed a concurrence in those denials, explaining why "the Trustee's attempt to establish standing by casting its challenge as one to the legality, rather than the lawfulness, of Transcon's rates" also fails. *Id.* at 6a. Judge Norris stated that, because "it is the Commission that has sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law," *id.* at 7a, federal courts cannot resolve the legality of coded rates in the context of this case. *Id.* at 7a-8a.

ARGUMENT

The cross-petition raises no issue warranting this Court's review. The court of appeals' holding that cross-petitioner lacks standing to challenge the carrier's filed discount tariffs is correct and does not conflict with the decision of any other court of appeals or any decision of this Court. Even if cross-petitioner had standing to challenge Transcon's use of shipper-account codes in its discount tariffs, the challenge lacks merit. The Commission has broad authority to determine the contents of tariffs and has reasonably determined that the filing of shipper-account codes in tariffs is permissible. Moreover, neither cross-petitioner nor any other party sought judicial review of the Commission decisions announcing that policy, and cross-petitioner cannot mount a collateral challenge to that policy here. Finally, the significance of cross-petitioner's claim is limited by virtue of the ICC's recent decision to reconsider whether to retain, modify, or eliminate its authorization for the filing of tariff rates containing shipper codes. Accordingly, the cross-petition should be denied.

1. Cross-petitioner contends (Cross-Pet. 8-9, 20-21) that the court of appeals erred in concluding that it lacks standing to claim that Transcon's use of shipper-account codes in its filed discount tariffs renders those tariffs illegal. In cross-petitioner's view, a claim that the tariffs illegally failed to reveal the identities of particular shippers is equivalent to a claim that the discount rates were not "filed" rates at all within the scope of 49 U.S.C. 10761(a) and 10762(a), and it concludes that such a claim may be raised by a carrier or bankruptcy trustee under this

Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, *supra*. That analysis is incorrect.

The Act requires motor common carriers to file tariffs setting forth their charges for all transportation services and to collect only the rates published in their filed tariffs 49 U.S.C. 10761(a), 10762(b). Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the carrier or shipper. See 49 U.S.C. 11902-11904. A trustee, receiver, or employee of a corporation that is subject to the jurisdiction of the ICC must file and publish its tariffs and thereafter "observe those tariffs until changed under law." 49 U.S.C. 11903. The Act is inconsistent with an attempt to evade those requirements on the basis that a carrier's filed rate was not "legal." Pursuant to 49 U.S.C. 11916:

> When a carrier files wtih the Interstate Commerce Commission or publishes a particular rate * * * the published or filed rate is conclusive proof against that carrier, its officers, and agents that it is the legal rate for that transportation or service in a proceeding begun under section 11902 or 11903 of this title. A departure, or offer to depart, from that rate is a violation of those sections.

In light of those provisions, the court of appeals correctly ruled that nothing in the Act supports cross-petitioner's attempt to treat Transcon's filed tariffs as void because they contained shipper-account codes. Transcon filed the shipper-account code tariffs with the Commission, after specifically requesting and receiving ICC approval to do so. See note 3, *supra*. Traffic moved under those tariffs, and the tariffs were never "changed under law," 49 U.S.C. 11903. Transcon's trustee cannot now unilaterally disavow those tariffs, and retroactively seek to rebill

shippers for higher amounts. Cf. *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913).

Contrary to cross-petitioner's claims (Cross-Pet. 6, 19-21), nothing in the court of appeals' analysis conflicts with *Maislin*. In that case, citing the Act's requirements that carriers must file their rates in tariffs and shippers must pay the filed rates, 49 U.S.C. 10761, 10762, the Court held that the ICC was precluded from making a negotiated rate the applicable rate, rather than requiring application of the filed tariff rate. 497 U.S. at 126-133. This case is quite different, because the discount rate that Transcon originally charged *is* a filed rate. See *Rebel Motor Freight, Inc. v. ICC*, 971 F.2d 1288, 1294 (6th Cir. 1992) (recognizing that *Maislin* is inapplicable where the rate applied is a filed rate). *Maislin* holds that adherence to the filed rate is "utterly central" to the administration of the Act. 497 U.S. at 132. In *Reiter v. Cooper*, 113 S. Ct. 1213, 1221 (1993), the Court reaffirmed that "tariff rates not disapproved by the ICC are legal rates, binding on both the shipper and the carrier." Under *Maislin*, the trustee can insist upon collecting a filed rate rather than a negotiated one; but it cannot claim a right to invalidate Transcon's discount tariffs in order to collect rates under Transcon's higher, bureau tariffs.

It would contradict the premise of the filed rate doctrine to permit a carrier to publish and collect one rate and later demand a higher rate on the theory that its own filing was a nullity. Under the Act, motor common carriers are responsible for setting the rates they publish and file with the ICC. 49 U.S.C. 10762(a)(1). Shippers are entitled to rely upon the rates published in a carrier's tariff. To prevent the filed rate doctrine from being undermined,

other courts faced with similar issues have reached the same conclusion as the court of appeals did here and have held that a carrier lacks standing to repudiate its own tariff.[6] No court of appeals has ever agreed with the trustee's theory.[7]

The trustee is not assisted by casting his challenge as one to the "legality" as well as "lawfulness" of Transcon's shipper-coded tariff rates. Cross-Pet. 8-9, 14, 20. Under the Act, unless the Commission rejects or suspends a proposed tariff in advance, the rate specified therein is the "legal" rate and the only rate that a carrier may charge (and that a shipper may pay) for common carriage unless and until that rate is set aside by the ICC as unreasonable or otherwise unlawful. *Maislin*, 497 U.S. at 128-129, quoting *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932); *ICC* v. *American Trucking Ass'ns, Inc.*, 467 U.S. 354, 360 n.4 (1984). Thus, as

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[6] See *Magnolia Provision Co.* v. *Beaumont, S.L.&W. Ry.*, 20 F.2d 384, 385 (S.D. Tex. 1927) ("It would be intolerable if a carrier could file with the Commission and cause to be published a rate, and then avoid its effect * * * by claiming either that it had violated * * * the law, or that it had failed in some technical requirement."), aff'd, 26 F.2d 72 (5th Cir.), cert. denied, 278 U.S. 620 (1928); *ICC* v. *Lifschultz Fast Freight Corp.*, 151 B.R. 150, 152-153 (N.D. Ill. 1993) (following the court of appeals' decision here with respect to the standing issue).

[7] Cross-petitioner errs (Cross-Pet. 6 n.6) in relying on decisions such as *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986). While that case and others have noted that publication is intended to benefit carriers as well as shippers, and have therefore allowed challenges to ICC publication policies at the behest of carriers, the carriers to which those decisions refer are not the publishing carrier but its competitors.

the court of appeals recognized, "an attack on the 'legality' of a rate means an allegation that the rate is not a *filed* rate." Pet. App. 22a. It is undisputed that Transcon submitted its shipper-account-code tariffs to the ICC and that those tariffs were placed in the Commission's public tariff files. Thus, these tariffs were filed with the ICC and, under *Maislin* and *Arizona Grocery*, contain the "legal" rates for the traffic covered by them.

Federal courts have no authority to determine that part of Transcon's tariffs are not properly published and that some other part of those tariffs therefore should govern shipments, including shipments made years earlier. As Judge Norris explained in his opinion concurring in the denial of rehearing (Cross-Pet. App. 6a-7a):

> [The court] cannot reach the question [of the legality of coded rates]. For if coded rates are not duly filed and published rates, then to the extent Transcon's rates were coded, they were not filed. That is, for shipments subject to discount because payment was made within 90 days, Transcon had no rates on file, and thus no basis for collecting undercharges. * * *
>
> In an attempt to establish an alternative filed rate for these shipments, the Trustee urges us to disaggregate Transcon's filing. He argues that, once the coded discounts are stricken, the filed rate is simply the bureau rate. But the bureau rate is only part of the filed rate. For shippers who pay within 90 days, the filed rate, if one exists, is the bureau rate less the discounts. We cannot strike the discounts and enforce the undiscounted bureau rates in their stead.

Judge Norris correctly concluded, *id.* at 7a, that the Commission has "sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law." See *Maislin*, 497 U.S. at 133, citing *ICC* v. *American Trucking Assn's, Inc.*, 467 U.S. at 364-365; *Burlington Northern*, 459 U.S. at 142-143 (judicial invalidation of a rate does not revive a prior rate unless the Commission so determines); see also *Genstar Chem. Ltd.* v. *ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981) (ICC has discretion to determine that the remedy for "any unlawfulness or irregularity" in published tariff rate charged to a shipper is measured not by a different tariff rate, but by the harm flowing from the unlawfulness or irregularity), cert. denied, 456 U.S. 905 (1982). Cross-petitioner provides no basis for carving out an exception from that settled rule so as to permit courts to review and reform its tariffs.[8]

2. Even if cross-petitioner had standing to challenge Transcon's filed rates, the claim that a published tariff is void under the Act if it fails to identify the shipper to whom the rate applies would not

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[8] Neither of the two decisions cited by cross-petitioner (Cross-Pet. 21 n.16) supports the view that courts can strike down part of a tariff and then enforce the remainder, as Judge Norris explained, Cross-Pet. App. 7a-8a. *Friedman Bag Co.* v. *Max C. Pope*, No. 40599 (I.C.C. May 22, 1992), recognizes that when the allegedly filed rate asserted by the carrier does not apply to the shipment at issue, the carrier may collect any other filed rate that is both applicable and reasonable. *Milne Truck Lines, Inc.* v. *Makita U.S.A., Inc.*, 970 F.2d 564, 568 (9th Cir. 1992), applied the filed rate rather than a negotiated one. The Ninth Circuit subsequently explained the difference between *Milne* and the issue in this case. See *RTC Transp., Inc.* v. *Conagra Poultry Co.*, 971 F.2d 368, 371 (1992) (per curiam).

warrant this Court's review. The Act does not specifically require that shippers' names be published. While the Act specifies certain requirements that tariffs must have, including publication of "rates," 49 U.S.C. 10762(a)(1), disclosure of the names of shippers is not specifically mandated. Rather, the Act states that the Commission "may require other information" to be published, 49 U.S.C. 10762(a)(1), and gives the Commission the responsibility to "prescribe the form and manner of publishing, filing, and keeping * * * open for public inspection" motor carrier tariffs.[9] 49 U.S.C. 10762(b)(1).

In the absence of any precise statutory requirement that shippers be named, the agency is entitled to make a reasonable determination of whether the use of shipper-account codes constitutes adequate tariff publication. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). "If the agency interpretation is not in conflict with the plain language of the statute, deference is due." *National R.R. Passenger Corp.* v. *Boston & Maine Corp*, 112 S. Ct. 1394, 1401 (1992). The Commission has reasonably determined that identification of the shipper by name is not an indispensable requirement of publication in the motor carrier industry.

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[9] The Act does particularize tariff requirements in other contexts. For instance, with respect to railroad tariffs, the Act states that the tariffs must disclose the "specific charges" and "identify plainly" the points between which freight will be shipped, the privileges given and facilities allowed, and any rules that change, affect, or determine the published rate. 49 U.S.C. 10762(b)(1)(A), (D), (E). The absence of a similar requirement as to publication of shipper names, for either railroad or motor carrier tariffs, cuts against the implication of such a rule.

Identification of shipper names is not inherently necessary to serve the underlying purpose of the tariff publication system of preventing unreasonable discrimination. Shippers who watch the tariffs can generally identify particular routes, commodities, and conditions of transportation without the name of the particular shipper involved. To that extent, requiring publication of shipper names is not essential.[10] On the other hand, the use of shipper codes, which is now common in motor carrier tariffs, serves the beneficial purpose of facilitating computerized billing and record keeping. Accordingly, the Commission, since the matter was first presented to it

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[10] The underlying premise of cross-petitioner's objection to shipper codes appears to be its criticism (Cross-Pet. 9-14) of the Commission's allowance of rates for individual shippers. That criticism, however, has no relevance to the cross-petition's challenge to the *coding* of such rates, which is the only question presented (apart from standing). Cross-Pet. i; *id.* at 22 (seeking a remand requiring the court of appeals only to decide the "legality" of the use of shipper-codes). In any event, rates for individual shippers are not automatically discriminatory. The Act does not require all shippers to be treated identically; it prohibits "unreasonable discrimination." 49 U.S.C. 10741(b). With respect to motor common carrier rates, "unreasonable" discrimination is charging or receiving different compensation "for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances." 49 U.S.C. 10741(a). Rate and service differences are not unlawful if they are based on differing transportation circumstances. Because carriers and shippers may have unique requirements, carriers may establish rates for particular shippers, and the issue of unreasonable discrimination must be determined on a case-by-case basis. See *Named Shipper*, 367 I.C.C. at 962-963. That determination is for the Commission to make. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352-353 (1940).

in 1985, has consistently concluded that the name of the shipper to whom a rate applies is not a necessary tariff component. See *Customer Account Codes*, 8 I.C.C.2d 47, 54 (1991).[11]

None of the authorities cited by cross-petitioner suggests that the ICC's interpretation is impermissible under *Chevron*. In *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) (Cross-Pet. 14 n.13), the court rejected a rate-averaging tariff provision and held that a tariff must show, for the benefit of competing carriers and competitors of the shipper, how the rate is calculated.[12] Here, all of the information needed to determine Transcon's rates is contained in the relevant tariffs. Nor are Commission decisions setting requirements for location codes (Cross-Pet. 18-19) relevant to the issues in this case. And, while the district court in *United States* v. *Chicago & Alton Ry.*, 148 F. 646, 648 (N.D. Ill. 1906), aff'd on other grounds, 156 F. 558 (7th Cir. 1907), aff'd, 212 U.S. 563 (1909) (Cross-Pet. 14, n.13), addressed publication issues, that decision was affirmed on a different ground, with the court of appeals stating that the "matter

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[11] That the Commission's Office of Compliance and Consumer Assistance (OCCA) argued a different position to the agency (Cross-Pet. 13-14) does not undermine the Commission's determination, nor impede OCCA's duty to enforce the statute as interpreted by the Commission. If anything, it demonstrates that the concerns raised by the trustee in these proceedings were fully presented to the Commission before it reached its contrary conclusion.

[12] Likewise, the Commission cases cited by cross-petitioner (Cross-Pet. 17-18) hold only that motor carrier tariffs must set forth the rate to be charged or the formula for determining how the rates will be calculated.

of publication has nothing to do with the case." 156 F. at 560.

In addition to lacking merit, cross-petitioner's challenge to the ICC's approval of shipper-account codes constitutes an improper collateral attack. As indicated above, in 1984 the ICC ruled in *Named Shipper* that tariffs may be limited to individual named shippers. In 1985 it authorized one carrier to publish rates by shipper code. *Customer Account Numbers*, STA No. 94-9406 (Feb. 13, 1985). In 1986 it granted permission to Transcon, see note 3, *supra*, and later to all carriers, *Outstanding Relief*, *supra*, to publish rates by shipper-account code. Finally, in 1991 it rejected a general challenge under the Act to the use of shipper codes in motor-carrier tariffs. *Customer Account Codes*, *supra*. Neither Transcon nor any other party sought review of those decisions, with the result that the industry and shippers have relied on them for nearly a decade. Cross-petitioner cannot challenge those decisions now, years after they were rendered, in the context of this ICC enforcement action.

Finally, the significance of cross-petitioner's challenge to shipper-code tariff rates is limited by the ICC's recent decision to reconsider whether to retain, modify, or eliminate its authorization for the filing of rates using shipper codes.[13] The trustee, and any other parties who are genuinely concerned about the use of shipper codes, have had the opportunity to participate in that proceeding before the Commission. And, of course, judicial review of the Commission's

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[13] *Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs*, No. 40888 (I.C.C. Jan. 5, 1993). We have reprinted the ICC's order in the appendix to this brief, *infra*.

final decision will be available under the Hobbs Act. 28 U.S.C. 2321, 2342. This Court's consideration of the issues raised by the cross-petition would therefore be premature.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1993

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

No. 40888

Service Date January 5, 1993

RECONSIDERATION OF SPECIAL TARIFF AUTHORITIES AUTHORIZING THE PUBLICATION OF CUSTOMER ACCOUNT CODES IN TARIFFS

AGENCY:

INTERSTATE COMMERCE COMMISSION.

ACTION:

Notice of Proposal to reconsider outstanding Special Tariff Authorities.

SUMMARY:

The Interstate Commerce Commission plans to reconsider all outstanding Special Tariff Authorities that allow carriers to publish tariff rates for shippers identified only through the means of account codes listed in the tariffs. Questions have been raised regarding whether the publication of rates in this manner complies with the rate disclosure requirements of the Interstate Commerce Act, and Congress has requested the Commission to initiate a proceeding to consider the matter. After consideration of

the comments received and the issues involved, the Commission expects to determine whether the Special Tariff Authorities should be continued, modified or revoked.

DATES:

Comments are due on March 8, 1993.

ADDRESSES:

Send comments (an original and 10 copies) referring to Docket No. 40888 to:

Interstate Commerce Commission
Office of the Secretary
Case Control Branch
Washington, D.C 20423

FOR FURTHER INFORMATION CONTACT:

James W. Greene (202) 927-5597

or

Ronald A. Hall (202) 927-5595

[TDD for hearing impaired (202) 927-5721]

SUPPLEMENTARY INFORMATION:

On January 30, 1985, the Commission approved a motor carrier's request to restrict the application of tariff rates to specific customers by the use of unique customer code numbers.[1] The reason advanced by the carrier in support of its request was primarily to facilitate the computerization of rating and billing processes. Subsequently, numerous similar authorizations were granted to other motor and water car-

[1] Special Tariff Authority No. 84-9406.

riers, and, on April 29, 1986, the Commission's Suspension/Special Permission Board, acting on its own motion, granted a Special Tariff Authority [2] which allowed all motor carriers and freight forwarders to make use of shipper account codes in tariffs filed by them or on their behalf. (A complete listing of all outstanding Special Tariff Authorities allowing the publication of shipper codes is contained in Appendix A.)

The Commission again addressed the issue of customer account codes in *Pet. for Declar. Order-Discounts and Customer Acct. Codes*, 8 I.C.C.2d 47 (1991). In that proceeding, the Commission declined to find customer account code tariffs unlawful, *per se*, but indicated its willingness to consider such tariffs on a case-by-case basis. As the Commission there stated (8 I.C.C.2d at 54):

> If a tariff lacks any of the essential information concerning the commodities, service points, and rate information, it is not the use of a customer code that would invalidate the tariff. Conversely, mere use of shipper codes does not mean necessarily that the tariff lacks any necessary information. [footnote omitted]

Based on Congress' request that we do so,[3] we are instituting this proceeding to reconsider whether the Special Tariff Authorities that allow carriers to publish tariff rates for shippers identified only through

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[2] Special Tariff Authority 86-639, amended April 29, 1986, to provide for numerical and/or alphabetical codes.

[3] Senate Report No. 102-351, dated July 30, 1992, and accompanying the U.S. Department of Transportation and Related Agencies Appropriations Bill, 1993.

the means of account codes should be continued, modified, or revoked.

Comments are invited from interested parties regarding the lawfulness of publishing rates through the use of shipper account codes that are not explained in the rates tariff or in a governing tariff. Comments are also invited as to whether the Commission should continue or revoke the existing Special Tariff Authorities, the likely impact of such action, and any modifications the Commission should consider with respect to such Authorities. We are well aware that shipper codes may be used in connection with other methods of tariff publication which are alleged to fail the disclosure requirements such as the range and trigger tariff provisions being considered in Docket Nom. 40887, *Range Tariffs of All Motors Common Carriers—Show Cause Proceeding*, show cause order served concurrently with the notice here. Parties are requested to limit their comments in this proceeding to the question of whether a tariff that in all other respects satisfies disclosure requirements should be deemed to be invalid simply because it is published utilizing undisclosed shipper codes.

Decided: December 23, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons and Phillips.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

[Appendix omitted]

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